

37 Am. Jur. 2d Fraud and Deceit § 198

American Jurisprudence, Second Edition | May 2021 Update

Fraud and Deceit

George Blum, J.D., John Bourdeau, J.D., Romualdo P. Eclavea, J.D., Janice Holben, J.D., Karl Oakes, J.D. and Eric C. Surette, J.D.

V. Concealment

A. In General

§ 198. Duty to speak

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  16, 17

A.L.R. Library

[Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold, 46 A.L.R.4th 546](#)

[Liability of vendor of structure for failure to disclose that it was built on filled ground, 80 A.L.R.2d 1453](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 233](#) (Instruction to jury—Concealment as fraud—Effect of partial disclosure)

Before nondisclosure or fraudulent concealment can be considered, a plaintiff must show that the defendant had a duty to disclose the information claimed to have been suppressed.¹ Accordingly, silence may constitute fraud when a duty to disclose exists.² Generally speaking, in the conduct of various transactions between persons involving business dealings, commercial negotiations, or other relationships relating to property, contracts, and miscellaneous rights, there are times and occasions when the law imposes upon a party a duty to speak rather than to remain silent in respect of certain facts within the party's knowledge,

and thus to disclose information,³ in order that both parties to a transaction may be placed on an equal footing.⁴ Where a defendant has a legal or equitable obligation to reveal material information, the defendant's failure to do so is equivalent to a misrepresentation and may therefore support a claim of actionable fraud where the remaining elements of that tort are proved.⁵

In the application of the rule concerning the duty to speak, however, it must be pointed out that while one cannot properly withhold the truth from those who have reason to expect information from him or her, those who do not look to a person for information and expect no disclosure from that person cannot properly complain of the person's silence or successfully contend that the person has suppressed the truth.⁶

Some of the circumstances that may make the duty to speak arise include:⁷

- (1) the relationship of the parties;
- (2) the relative knowledge of the parties;
- (3) the value of the particular fact;
- (4) the plaintiff's opportunity to ascertain the fact;
- (5) the customs of the trade; and
- (6) other relevant circumstances.

A duty to disclose facts arises only when the parties are in a relationship that gives rise to the duty,⁸ such as a seller and buyer, an employer and prospective employee, a doctor and patient, or parties entering into any kind of contractual agreement.⁹

The duty to disclose and the corresponding liability for a failure to disclose may also arise when a party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party to act or refrain from acting, and the nondisclosing party knows that failure to disclose such information to the other party will render a prior statement or representation untrue or misleading.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Former employees failed to plead sufficient facts to show that senior manager, who allegedly represented that employees could elect to be paid less in their monthly bonuses in order to retain reserves for future losses and that they would be paid any of the reserve amounts upon termination of their employment contracts, owed them a duty to disclose, as required to state claim for fraud by omission under Texas law; complaint did not specify what information manager personally disclosed or what representations she personally made that would obligate her to make further disclosures. [Hoffman v. AmericaHomeKey, Inc.](#), 23 F. Supp. 3d 734 (N.D. Tex. 2014).

Under South Carolina law, non-disclosure becomes fraudulent concealment only when it is duty of party having knowledge of facts to make them known to other party to transaction. [In re Atlas Roofing Corp. Chalet Shingle Products Liability Litigation](#), 22 F. Supp. 3d 1322 (N.D. Ga. 2014).

To state a claim for the tort of silent fraud under Michigan law, a plaintiff must allege more than non-disclosure; a plaintiff must establish that the defendant had a legal duty to make a disclosure. [MacDonald v. Thomas M. Cooley Law School](#), 724 F.3d 654 (6th Cir. 2013).

Under Oklahoma law, for purposes of a claim of constructive fraud, in determining whether there is a duty to speak, consideration must be given to the situation of the parties, the matters with which they are dealing, and the subject matter in hand. [Myklatun v. Flotek Industries, Inc.](#), 734 F.3d 1230 (10th Cir. 2013).

Even the presence of information online does not automatically defeat exclusive knowledge by the defendant, so as to support a finding of a duty to disclose on a claim of fraud based on nondisclosure or concealment. [In re MyFord Touch Consumer Litigation](#), 46 F. Supp. 3d 936 (N.D. Cal. 2014).

Under Delaware law, fiduciary who learns that earlier communications to beneficiaries were false and nonetheless knowingly and in bad faith remains silent even as beneficiaries continue to rely on those earlier statements thereby breaches duty of loyalty. [In re PMTS Liquidating Corp.](#), 526 B.R. 536 (D. Del. 2014).

Under the omission theory of liability for fraud, under Mississippi law, whether the defendant had a duty to disclose to plaintiff certain information that defendant knew or should have known would have prevented her injuries depends upon whether the parties had a fiduciary or special relationship. [Chatman v. Pfizer, Inc.](#), 960 F. Supp. 2d 641 (S.D. Miss. 2013).

Under Nebraska law, a party might be liable for fraudulent concealment if, but only if, that party is also under a duty to the other to exercise reasonable care to disclose the matter in question. [City of South Sioux City, Nebraska v. Charter Oak Fire Insurance Company](#), 385 F. Supp. 3d 854 (D. Neb. 2019).

Under New York law, a fraudulent concealment claim shares the same elements as common law fraud claim with the additional requirement that a plaintiff must show that the defendant had a duty to disclose the material information. [Barnett v. Countrywide Bank, FSB](#), 60 F. Supp. 3d 379 (E.D. N.Y. 2014).

In considering whether a complaint adequately alleges a duty to disclose, as required for a fraud-by-omission claim under Ohio law, courts examine allegations regarding: (1) the relationship or situation giving rise to the duty to speak; (2) the event or events triggering the duty to speak and/or the general time period when the relationship arose and fraudulent conduct occurred; (3) the general content of the information withheld and its materiality; (4) the identity of those breaching the duty to disclose; (5) what the defendant gained by withholding information; (6) why plaintiff's reliance on the omission was both reasonable and detrimental; and (7) damages proximately flowing from the reliance. [Brown v. Whirlpool Corp.](#), 996 F. Supp. 2d 623 (N.D. Ohio 2014).

Landlord did not have duty to disclose information about availability of parking to tenant and, thus, was not liable for fraudulent concealment under Texas law; tenant had equal opportunity to discover truth about availability of parking, tenant had opportunity before signing lease agreement, and after signing lease agreement but before expiration of contingency period, to contact nearby parking lots and assess feasibility of locating off site parking. [WC 1899 McKinney Avenue, LLC v. STK Dallas, LLC](#), 380 F. Supp. 3d 595 (W.D. Tex. 2019).

Under California law, one who intends to commit a tort does not have a duty to disclose that intention to his or her intended victim, of kind that might support additional claim by victim for fraudulent failure to disclose. [In re Silva](#), 539 B.R. 172 (Bankr. C.D. Cal. 2015).

Individual Chapter 11 debtor was fraudulently induced to sign consulting agreement, not only as result of consultant's false representations regarding his ability to recover \$500,000 in funds on debtor's behalf, but as result of consultant's failure to disclose that he had previously been convicted of grand larceny for stealing funds under false pretenses while selectively disclosing other facts about his background meant to impress debtor with his qualifications and trustworthiness; duty to disclose grand larceny conviction arose from selective disclosures that consultant had made to persuade debtor to hire him. [In re Herrera-Edwards](#), 578 B.R. 853 (Bankr. M.D. Fla. 2017).

The duty imposed on the speaking party for purposes of a fraudulent concealment claim is to disclose those facts that are material to the ones already stated so as to make them truthful. [CNH America, LLC v. Ligon Capital, LLC](#), 160 So. 3d 1195 (Ala. 2013).

Where one person sustains towards another a relation of trust and confidence, his silence when he should speak or his failure to disclose what he ought to disclose constitutes fraud in law just as actual affirmative false representations. [Johnson v. Johnson](#), 747 S.E.2d 518 (Ga. Ct. App. 2013).

Whether a party to a business transaction has a duty to disclose a fact that he or she knows may justifiably induce the other to act or refrain from acting is determined by all the circumstances. [deNourie & Yost Homes, LLC v. Frost](#), 289 Neb. 136, 854 N.W.2d 298 (2014).

The recipient of a representation is entitled to know the undisclosed facts, for the purposes of a claim for fraudulent misrepresentation, insofar as they are material and to form his own opinion of their effect. [Long v. Rice](#), 2013-Ohio-2402, 992 N.E.2d 1220 (Ohio Ct. App. 11th Dist. Ashtabula County 2013).

Where the peculiar circumstances give rise to a duty on the part of one of the parties to a contract to disclose material facts and the party remains silent to his or her benefit and to the other party's detriment, the failure to speak constitutes fraud. [Croslin v. Enerlex, Inc.](#), 2013 OK 34, 308 P.3d 1041 (Okla. 2013).

[END OF SUPPLEMENT]

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Davis v. HSBC Bank Nevada, N.A.](#), 691 F.3d 1152 (9th Cir. 2012) (applying California law); [Barr v. Dyke](#), 2012 ME 108, 49 A.3d 1280 (Me. 2012); [Oxbow Calcining USA Inc. v. American Indus. Partners](#), 96 A.D.3d 646, 948 N.Y.S.2d 24 (1st Dep't 2012).
- 2 [Moses.com Securities, Inc. v. Comprehensive Software Systems, Inc.](#), 406 F.3d 1052 (8th Cir. 2005) (applying Missouri law); [Scotts Co. LLC v. Liberty Mut. Ins. Co.](#), 606 F. Supp. 2d 722 (S.D. Ohio 2009) (applying Ohio law); [Dechant v. Saaman Corp.](#), 63 S.W.3d 293 (Mo. Ct. App. E.D. 2001).
- 3 [Farrar v. Churchill](#), 135 U.S. 609, 10 S. Ct. 771, 34 L. Ed. 246 (1890); [Dungan v. Smith](#), 76 N.M. 424, 415 P.2d 549 (1966) (recognizing rule).
- 4 [Dow Chemical Co. v. Mahlum](#), 114 Nev. 1468, 970 P.2d 98 (1998).
- 5 [Meritage Homes Corp. v. Hancock](#), 522 F. Supp. 2d 1203 (D. Ariz. 2007) (applying Arizona law); [Osterhaus v. Toth](#), 39 Kan. App. 2d 999, 187 P.3d 126 (2008), decision *aff'd*, 291 Kan. 759, 249 P.3d 888 (2011).
- 6 [Hill v. Securities Inv. Co. of St. Louis](#), 423 S.W.2d 836 (Mo. 1968).
- 7 [Parsons & Whittemore Enterprises Corp. v. Cello Energy, LLC](#), 613 F. Supp. 2d 1271 (S.D. Ala. 2009) (applying Alabama law); [Armstrong Business Services, Inc. v. AmSouth Bank](#), 817 So. 2d 665 (Ala. 2001).
- 8 [Mitchell Co., Inc. v. Campus](#), 672 F. Supp. 2d 1217 (S.D. Ala. 2009) (applying Florida law).
- 9 [Shin v. Kong](#), 80 Cal. App. 4th 498, 95 Cal. Rptr. 2d 304 (1st Dist. 2000).
- 10 [Onyx Environmental Services, LLC v. Maison](#), 407 F. Supp. 2d 874 (N.D. Ohio 2005).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.